Neutral Citation Number: [2010] EWCA Civ 447
Case No: B4/2010/0093 & B4/2010/0519

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY, FAMILY DIVISION
(HIS HONOUR JUDGE PEARLMAN CBE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 11th March 2010

Before:

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
LORD JUSTICE AIKENS

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IN THE MATTER OF S (Children)

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The Appellant father appeared in person.

Jacqueline Werhle (instructed by Edward Pilling and Company Solicitors) appeared on behalf of the Respondent mother.

Miss Sarah Gibbons (instructed by the Oxford Law Group) appeared on behalf of the Children's Guardian.

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Judgment

(As Approved by the Court)

Lord Justice Thorpe:

1. I have already sufficiently introduced this case, its character and its history, in disposing of the applications for permission. All that remains is to rule on the appeal which arises in consequence of a grant of permission to Mr S.

2. The complaint that the judge essentially ducks the issue in failing to find the mother's obstruction of contact deliberate and wilful is difficult indeed to make good given that the judge specifically emphasised that she had gained some understanding of the parties as a result of three days of evidence and submissions in her court. However, the ground that rings clear with me is that the order is effectively no order. The order for contact has to bear the weight of the condition attached in paragraph (viii) of paragraph 7:

   "it is a condition of the contact … that the children have to decide for each contact whether to take it up or not."

   That is a highly unusual provision and, whilst it seems on the face of it to conform with the children's wishes and feelings, in reality it burdens them with a responsibility that they should not be asked to bear at their respective ages of 12 and 13.

3. The judge's good intentions are manifest. If the judge had magic powers she would have exercised them for the good of all in this deeply fractured family. But what she ultimately imposed was a notion of her own which did not have the imprimatur of either expert in the case, the guardian and Dr Jacobs, and did not have the support of either parent. So even on 11 November it was in my opinion vulnerable to rejection on appellate review.

4. But we know much more than the judge did because we have the benefit of excellent attendance notes taken by the guardian when, in response to the judge's request, she visited the children, O on 12 November and T on 15 November.

5. The material in the attendance on O is particularly concerning. O's rejection of his father is in the most extreme and worrying terms. He said that he hated his father, who he declined to call 'Dad', and referred to variously as 'him' or 'it'. In relation to orders of the court, O said that he definitely would not go to the meeting ordered by the judge on 28 November, he said that he should not be made to go, he suggested that the headmaster should tell his father that he was not allowed to leave school. Plainly, had he had the election, there would have been no meeting.

6. The meeting did take place and according to the statement of Ms Witty, which I remind myself has not been tested by cross-examination, it was an extremely successful outing. And those two factors in combination suggest that this little boy needs the discipline of an external authority which regulates the time that he spends with each parent and his relationship with each parent.

7. Miss Gibbons has said, well, what about his wishes and feelings? My response to that is that they are trumped by his welfare. Looking on in the attendance note he says to the guardian:

" I want to leave my school. It's much more strict than it used to be. Me and my friends get picked on for things that never used to matter."

Well, if wishes and feelings rule he would be walking away from school. But fortunately they do not and children of his age have to have their lives regulated by adult judgment.

8. So it does seem to me that taking the considerations that obtained on 11 November and the subsequent developments, it is manifest that Mr S's complaint about sub-paragraph (viii) is well founded.

9. Of course I entirely understand that the whole family is fed to death with litigation and that is expressed in the first consent order:

"Neither parent shall make any application concerning or affecting Residence or Contact until after 1st January 2011".

So there was intended to be a year of tranquillity. Well, subsequent events demonstrate that that is inevitably lost to this family. The recent letter from the headmaster to the parents shows that O's chances of completing his preparatory school education at his current school are in jeopardy and plainly that independent factor points towards the need for whatever support and therapeutic help this boy can be given.

10. So the outcome that I would propose is to allow the father's appeal, to set aside the condition of contact expressed in sub-paragraph (viii) but to stay that setting aside pending a remitted hearing which must be before a judge of the Division. It is important that the case receives as far as possible judicial continuity. It is important that the case be listed before a judge of the Division as soon as reasonably practicable to allow that judge to direct the further course of the remitted hearing and, essentially, to put his stamp on it. It is a case that is at the extreme end of difficulty in the difficult field of intractable contact disputes.

11. Fortunately this is a family that can afford the best possible advice, and it is perhaps with the advantage of hindsight regrettable that a consultant child and adolescent psychiatrist has not been previously introduced into the case. The instruction of such an expert should be directed if not by this order then by the first order of the Family Division judge. The availability of experts with greatest seniority and experience within the Greater London area is something that plainly needs to be seized, it is an opportunity not to be missed and I would at once identify Dr Kirk Weir, who has particular interest in this very difficult field of family dysfunction, I would mention Dr Hamish Cameron, perhaps the most senior consultant child and adolescent psychiatrist, I would mention Dr Judith Trowel and finally I would mention Dr Danya Glaser, the most recently retired of those consultants.

12. Plainly the children need respite, not just from litigation but from interrogation, so bringing in a fresh expert at this stage has its disadvantages which can only be matched by the greatest sensitivity on the part of the expert instructed. Plainly any one of the four consultants whom I have named would have huge skill in communicating with and understanding children demonstrating the level of disturbance that these children are demonstrating, so I would think that anxiety at further involvement of an expert can be

tempered by a recognition that the sort of experts who are in the court's contemplation are exceptionally skilful.

13. So that is the disposal that I propose and there is nothing more that I wish to say.

Lord Justice Wall:

14. Whilst there is much that I could say in this very unhappy and difficult case, I do not think that a separate judgment from me would serve any purpose and therefore I content myself by agreeing entirely with what my Lord has said.

Lord Justice Aikens:

15. I agree entirely with the proposed disposal of Thorpe LJ and the reasons that he has given.

Order: Appeal allowed